

**OPERATING COVENANT AGREEMENT
(Holliday Rock)**

between

**THE CITY OF UPLAND
a California municipal corporation,**

and

**HOLLIDAY ROCK CO, INC.
a California Corporation**

and

**HOLLIDAY TRUCKING, INC.
a California Corporation**

[Dated as of July 1, 2021, for reference purposes only]

This OPERATING COVENANT AGREEMENT ("Agreement") is entered into by and between (i) the CITY OF UPLAND, a California municipal corporation ("City"), (ii) HOLLIDAY ROCK CO., INC., a California corporation, and (iii) HOLLIDAY TRUCKING, INC., a California corporation ((ii) and (iii) collectively, "Holliday Rock"). The City and Holliday Rock are individually a "Party" and collectively the "Parties."

RECITALS

A. Holliday Rock owns and operates commercial aggregate, concrete, and asphalt producing facilities (collectively, "Facility") within the City, headquartered at 1401 N. Benson Avenue, and within City of Upland, County of San Bernardino (collectively, "Property").

B. In 2007, the Parties executed a fifteen-year Operating Covenant Agreement that incentivized the operation of the Facility on Property, and which is set to expire in June, 2022.

C. Holliday Rock generates, and the Parties wish to ensure via execution of this Agreement that Holliday Rock continues to generate, significant sales and service-related revenues, which will result in the generation of significant new local sales tax revenues from Facility for the City.

D. The City, in consideration of new and additional local sales tax revenues, property taxes, employment benefits, and other tangible and intangible benefits to be received by City and arising from the continuous operation of the Facility within the City, as described in this Agreement, desires to provide certain payments to Holliday Rock as an incentive to continue the operation of the Facility within the City.

E. The continuous operation of the Facility will provide significant public benefits to the City, in that the additional local sales tax revenues and employment opportunities to be generated by such activities represent a significant source of new and additional public revenue for the City, which may be used by the City for the funding of necessary public services and facilities, including public safety services and facilities. The City has further determined that the continuous operation of the Facility serves the additional public purpose of fostering a business and civic environment which may attract additional businesses and investment in the community due to the availability of the increased public and private services and economic activity resulting therefrom.

NOW, THEREFORE, in consideration of the mutual promises contained herein, and for such other good and valuable consideration, the receipt of which is hereby acknowledged, the City and Holliday Rock agree as follows:

- 1. Incorporation of Recitals.** The Recitals of fact set forth above are true and correct and are incorporated into this Agreement in their entirety by this reference.
- 2. Effective Date of this Agreement.**

2.1 This Agreement is dated July 1 for reference purposes only. This Agreement will not become binding on either of the Parties unless and until the first date on which all of the following occur, if at all ("Effective Date"):

2.1.1 Holliday Rock has delivered fully executed copies of the Official Action, authorizing its entry into and performance of this Agreement;

2.1.2 This Agreement is approved by the City Council of the City at a public meeting of the City, and such approval is evidenced by a resolution adopted by the City Council of the City; and

2.1.3 This Agreement is executed by the authorized representative(s) of the City and delivered to Holliday Rock.

2.2 If all conditions precedent to the Effective Date are not satisfied on or before January 1, 2022, then no part of this Agreement shall become binding on or enforceable against any Party and any prior signatures or approvals of this Agreement by either the City or Holliday Rock shall be void and of no force or effect.

3. Term of this Agreement. This Agreement shall commence on the Effective Date and, unless terminated sooner pursuant to the provisions of this Agreement, shall continue in effect thereafter until the last day of the Eligibility Period (which time period is referred to in this Agreement as the "Term"), subject to any rights or remedies available to a Party to earlier terminate this Agreement upon the Default of the other Party.

4. Representations and Warranties of the City.

4.1 The City represents and warrants to Holliday Rock that to the best of City's actual current knowledge:

4.1.1 The City is a public body, corporate and politic, exercising governmental functions and powers and organized and existing under the laws of the State of California;

4.1.2 The City has taken all actions required by law to approve the execution of this Agreement;

4.1.3 The City's entry into this Agreement and/or the performance of the City's obligations under this Agreement does not violate any contract, agreement, or other legal obligation of the City;

4.1.4 There are no pending claims or lawsuits against the City that will delay or prevent the performance of the City's obligations under this Agreement; and

4.1.5 The City has the legal right, power and authority to enter into this Agreement and to consummate the transactions contemplated by this Agreement, and the

execution, delivery and performance of this Agreement has been duly authorized and no other action by the City is requisite to the valid and binding execution, delivery and performance of this Covenant Agreement, except as otherwise expressly set forth herein; and

4.1.6 The individual executing this Agreement is authorized to execute this Agreement on behalf of the City.

4.2 The representations and warranties of the City set forth in this Section 4 are material consideration to Holliday Rock and the City acknowledges that Holliday Rock is relying upon the representations of the City set forth in this Section 4 in undertaking its obligations under this Agreement.

4.3 As used in this Agreement, the term "City's actual current knowledge" shall mean, and shall be limited to, the actual current knowledge of Stephen Parker (Acting City Manager) as of the Effective Date, without having undertaken any independent inquiry or investigation for the purposes of making such representation or warranty and without any duty of inquiry or investigation.

5. Representations and Warranties of Holliday Rock.

5.1 Holliday Rock represents and warrants to the City that to the best of Holliday Rock's actual current knowledge:

5.1.1 The Holliday Rock entities are duly formed California corporations, organized, qualified and in good standing to do business in the State of California and in the City;

5.1.2 The individual(s) executing this Agreement on behalf of Holliday Rock is/are authorized to execute this Agreement on behalf of Holliday Rock;

5.1.3 Holliday Rock has taken all actions required by law to approve the execution of this Covenant Agreement;

5.1.4 Holliday Rock's entry into this Agreement and/or the performance of Holliday Rock's obligations under this Agreement do not violate any contract, agreement, or other legal obligation of Holliday Rock;

5.1.5 Holliday Rock's entry into this Agreement and/or the performance of Holliday Rock's obligations under this Agreement does not constitute a violation of any state or federal statute or judicial decision to which Holliday Rock is subject;

5.1.6 There are no pending lawsuits or other actions or proceedings which would delay, prevent or impair the timely performance of Holliday Rock's obligations under this Agreement; and

5.1.7 Holliday Rock has the legal right, power and authority to enter into this Agreement and to consummate the transactions contemplated by this Agreement, and the execution, delivery and performance of this Agreement have been duly authorized by Holliday Rock and no other action by Holliday Rock is requisite to the valid and binding execution, delivery and performance of this Agreement, except as otherwise expressly set forth in this Agreement.

5.2 The representations and warranties of Holliday Rock set forth in this Section are material consideration to the City and Holliday Rock acknowledges that the City is relying upon the representations of Holliday Rock set forth in this Section 5 in undertaking its obligations under this Agreement.

5.3 As used in this Agreement, the term "Holliday Rock's actual current knowledge" shall mean, and shall be limited to, the actual current knowledge of John F. Holliday as of the date of the making of the representation or warranty, without having undertaken any independent inquiry or investigation for the purpose of making such representation or warranty and without any duty of inquiry or investigation.

5.4 All of the terms, covenants and conditions of this Agreement shall be binding on and shall inure to the benefit of Holliday Rock and its permitted nominees, successors, and assigns. Wherever the term "Holliday Rock" is used herein, such term shall include any permitted nominee, assignee, or successor of Holliday Rock.

5.5 The qualifications and identity of Holliday Rock are of particular concern to the City, and it is because of such qualifications and identity that the City has entered into this Agreement with Holliday Rock. No voluntary or involuntary successor-in-interest of Holliday Rock shall acquire any rights or powers under this Agreement except as expressly set forth herein.

6. **Definitions.** All initially capitalized terms used in this Agreement shall have the meanings set forth below or, if not set forth below, where such terms first appear in this Agreement.

6.1 "CDTFA" means the California Department of Tax and Fee Administration.

6.2 "CEQA" means and refers to the California Environmental Quality Act, Public Resources Code Sections 21000, et seq.

6.3 "City" means and refers to the City of Upland, a California municipal corporation, and any nominee, assignee of, or successor to, its rights, powers and responsibilities.

6.4 "City Attorney" means and refers to the City Attorney of the City of Upland, California.

6.5 "Company Sales Activities" means and refers to the commercially reasonable

business practices and activities associated with sale and distribution of services and products related to its combined aggregate, concrete, and asphalt producing Facility. The Company Sales Activities will be undertaken by Holliday Rock in compliance with all federal, state and local laws and regulations. Holliday Rock shall promote and market the Company Sales Activities in a commercially reasonable manner, with the objective of maximizing the generation of Local Sales Tax Revenues.

6.6 “Computation Quarter” means each calendar quarter beginning on January 1, April 1, July 1 or October 1, as applicable, and ending on the succeeding March 31, June 30, September 30 or December 31, as applicable. The first Computation Quarter within the Eligibility period shall commence on October 1, 2021 and shall be referred to herein as “Computation Quarter 1,” with each succeeding Computation Quarter within the Eligibility Period being consecutively numbered, concluding with Computation Quarter 60. Holliday Rock shall only be entitled to Covenant Payment calculated for Computation Quarter 1 based upon revenues generated and received by City following the Effective Date of this Agreement.

6.7 “Covenant Payment(s)” means and refers to payments made to Holliday Rock in accordance with Section 8 of this Agreement.

6.8 “Holliday Rock” means and refers to, collectively, Holliday Rock Co., Inc, a California corporation, and Holliday Trucking Inc., a California corporation, and their permitted successors and assigns, which are located in the City of Upland, California at the Facility.

6.9 “Eligibility Period” means and refers to the period commencing on July 1 and ending on the last day of Fiscal Year 15 (as defined herein), except that there is no termination date for the fee for rock, sand, and gravel extraction provided for in this Agreement, as specified in Section 8.3 herein.

6.9 “Enforced Delay” shall have the meaning ascribed to the term in Section 28.

6.10 “Facility” means, collectively, the commercial aggregate, concrete, and asphalt producing facility located at 2193 West Foothill Boulevard, City of Upland, County of San Bernardino, and, additionally, Holliday Rock Corporate Headquarters located at 1401 N. Benson Avenue and other commercial sites including 2006 N. Campus Avenue and 1499 N. Benson Avenue in Upland. Holliday Rock has indicated that for business purposes independent of this Agreement that it shall, at its earliest reasonable opportunity and pursuant to law and regulation of the CDTFA and Sales Tax law, consolidate a substantial portion its non-Upland retail point of sale operations into the Facility. The existing non-Upland retail points of sale facilities to be consolidated are identified on Exhibit A hereto. Thereafter, each year, before or upon the anniversary date of the Effective Date, the parties shall meet and confer in regards to any revisions Holliday Rock may have made to Exhibit A.

6.11 “Fiscal Year” means and refers to each fiscal year of the City beginning on July 1 of each calendar year and ending on June 30 of the following calendar year that occurs during

the Eligibility Period, with the first Fiscal Year ending during the Term being referred to as "Fiscal Year 1" and each succeeding Fiscal Year thereafter being consecutively numbered, concluding with "Fiscal Year 15."

6.12 "Liquidated Damages" means, for purposes of Section 22, as follows:

(a) If an uncured breach pursuant to Section 21 occurs during Computation Quarters 1 through 40, an amount equal to the previous two (2) Computation Quarter Covenant Payments paid to Holliday Rock prior to the Computation Quarter in which breach occurs.

6.13 "Local Sales Tax Revenues" means the net Sales Tax received by the City from the CDTFA pursuant to the application of the Sales Tax Law (as such statutes may hereafter be amended, substituted, replaced, re-numbered, moved, or modified by any successor law) and attributable to Company Sales Activities in a particular Fiscal Year during the Eligibility Period, excluding any subsequently local sales tax measure approved by the City voters. Local Sales Tax Revenues shall not include: (i) Penalty Assessments, (ii) any Sales Tax levied by, collected for, or allocated to the State of California, the County of San Bernardino, or a district or any entity (including an allocation to a statewide or countywide pool) other than City, (iii) any administrative fee charged by the CDTFA, (iv) any Sales Tax subject to any sharing, rebate, offset, or other charge imposed pursuant to any applicable provision of federal, state, or local (except City's) law, rule, or regulation, (v) any Sales Tax attributable to any transaction not consummated within the Eligibility Period, or (vi) any Sales Tax (or other funds measured by Sales Tax) required by the State of California to be paid over to another public entity (including the State) or set aside and/or pledged to a specific use other than for deposit into or payment from the City's general fund.

Without limiting the generality of the foregoing, Holliday Rock acknowledges that the California legislature has in the past adopted certain legislation which diverted to the State of California a portion of the Local Sales Tax Revenues which would otherwise be payable to the City. Holliday Rock acknowledges that it is possible that the legislature may enact similar legislation in the future, which would cause a corresponding reduction of and/or delay in the payment of the Local Sales Tax Revenues, and that such reduction will cause Holliday Rock a corresponding reduction and/or delay in the payment of the Covenant Payments due to Holliday Rock during such time as such legislation is in effect. Furthermore, Holliday Rock acknowledges that it is possible that the legislation described above, or some variant thereof, may be enacted and effective during one or more subsequent times during the Term and may materially and negatively impact the amount of Local Sales Tax Revenues and, accordingly, Covenant Payments. The City does not make any representation, warranty, or commitment concerning the future actions of the California legislature with respect to the allocation of Local Sales Tax Revenues to the City. Holliday Rock agrees that it is undertaking its obligations under this Agreement after having considered, and expressly assuming the risk of, the possibility of the enactment of such legislation.

The foregoing paragraph notwithstanding, City acknowledges that the California legislature may provide for the payment to City of other revenues for the purpose of offsetting

any losses in Local Sales Tax Revenues resulting from the enactment of legislation of the type described in the immediately preceding paragraph. City agrees that, should the California legislature provide for such offsetting revenues, then for purposes of this Agreement and the computation of any Covenant Payments which may become due to Holliday Rock hereunder, City will consider any such offsetting revenues which are (i) indexed to Sales Tax and offset the loss of Sales Tax revenues to the City on a dollar for dollar basis, (ii) actually received by the City, and (iii) not subject to any restrictions on use beyond those which are otherwise generally applicable to sales tax revenues received by California municipalities, to be Local Sales Tax Revenues within the meaning of this Agreement.

6.14 "Negotiation Period" shall have the meaning ascribed to the term in subsection 9.2.

6.15 "Notice of Appeal" shall have the meaning ascribed to the term in subsection 9.1.

6.16 "Notice of Determination" shall have the meaning ascribed to the term in subsection 9.1.

6.17 "Official Action" means and refers to the official action of Holliday Rock authorizing its entry into and performance of this Agreement.

6.18 "Penalty Assessments" means penalties, assessments, collection costs, and other costs, fees, or charges resulting from late or underpaid payments of Sales Tax and which are levied, assessed, or otherwise collected from Holliday Rock.

6.19 "Prohibited Financial Assistance" shall have the meaning ascribed to the term in subsection 10.2.

6.20 "Recorded, record, or recordation" means the recordation of the specified document(s) in the official records of the Recorder of the County of San Bernardino, California.

6.21 "Sales Tax" means all sales and use taxes levied under the authority of the Sales Tax Law attributable to Company Sales Activities, excluding Sales Tax which is to be refunded to Holliday Rock because of an overpayment of Sales Tax.

6.22 "Sales Tax Law" means (i) California Revenue and Taxation Code Section 7200 et seq., and any successor law thereto, (ii) any legislation allowing City or other public agency with jurisdiction in City to levy any form of local Sales Tax on the operations of Holliday Rock, and (iii) regulations of the CDTFA and other binding rulings and interpretations relating to (i) and (ii) hereof.

6.23 "Term" shall have the meaning ascribed to the term in Section 3.

7. Restrictions on Assignment and Change in Control.

7.1 The qualifications and identity of Holliday Rock are of particular concern to the City. The City would not enter into this Agreement if not for the qualifications and identity of Holliday Rock. Holliday Rock shall promptly notify the City in writing of any and all changes whatsoever in the identity of the business entities or individuals either comprising or in control of Holliday Rock, as well as any and all changes in the interest or the degree of control of Holliday Rock by any such person, of which information Holliday Rock or any of its principals, shareholders, members, or officers are notified or may otherwise have knowledge or information of. This Agreement may be terminated by the City if there is any significant or material change, whether voluntary or involuntary, in membership, ownership, management, or control of either entity of Holliday Rock (other than such changes occasioned by the death or incapacity of any individual) that have not been approved by the City prior to the time of such change, or the City may seek other appropriate relief; provided, however, that (i) the City shall first notify Holliday Rock in writing of its intention to terminate this Agreement or to exercise any other remedy, and (ii) Holliday Rock shall have twenty (20) calendar days following receipt of such written notice to commence and thereafter diligently and continuously proceed to cure the default of Holliday Rock and submit evidence of the initiation and satisfactory completion of such cure to the City, in a form and substance reasonably satisfactory to the City.

7.2 Holliday Rock shall not sell, assign, convey, create any trust or estate with respect to, or otherwise transfer, assign, or encumber (all of the foregoing, collectively, "Transfer") any of its rights or interests in this Agreement. Any actual or attempted Transfer shall constitute a Default of Holliday Rock.

8. Covenant Payments.

8.1 As used in this Section 8, the following terms shall have the following meanings:

8.1.1 "City Retained Portion" means, for any particular Fiscal Year within the Eligibility Period, an amount equal to either: (i) if the amount of Local Sales Tax Revenues attributable to such Fiscal Year is equal to or less than \$400,000, then the full amount of such Local Sales Tax Revenues, or (ii) if the amount of Local Sales Tax Revenues attributable to such Fiscal Year is greater than \$400,000, then either (a) \$400,000, or (b) 60% of such Local Sales Tax Revenues, whichever is greater.

8.1.2 "Covenant Payment" means, for any particular Fiscal Year within the Eligibility Period, an amount equal to the Local Sales Tax Revenues attributable to the Facility in such Fiscal Year less the City Retained Portion. The following represent examples of the application of the requirements and provisions of this Section 8: (i) if Local Sales Tax Revenues for a Fiscal Year are \$400,000 or less, then the Covenant Payment for such Fiscal Year is Zero Dollars; (ii) if Local Sales Tax Revenues for a Fiscal Year are \$600,000, then the Covenant Payment for such Fiscal Year is \$200,000; (iii) if the Local Sales Tax Revenues for a Fiscal Year are \$800,000, then the Covenant Payment for such Fiscal Year is \$320,000; and (iv) if the Local Sales Tax Revenues for a Fiscal Year are \$1,000,000, then the Covenant Payment for such Fiscal Year is \$400,000.

8.2 In consideration of Holliday Rock's obligations set forth in this Agreement, and subject to satisfaction of all conditions precedent thereto, the City shall, with respect to each Fiscal Year within the Eligibility Period, pay to Holliday Rock, from any lawful source, an amount equal to Covenant Payment, determined and paid in accordance with this Agreement.

8.3 In consideration of City's obligations set forth in this Agreement, and for public benefits which are herein acknowledged by both Parties, Holliday Rock agrees to pay to the City a fee of \$0.13 per ton of rock, sand, and gravel extracted from its Facility, subject to an annual adjustment based on that year's Consumer Price Index. This obligation is not subject to the same Term as the remainder of this Agreement, and will terminate only upon separate written agreement by both Parties.

8.4 The City acknowledges and agrees that nothing in this Agreement is or shall be deemed to be a representation, warranty, or guarantee that Holliday Rock shall generate Local Sales Tax Revenues in any specific amount or any amount at all.

9. Determination of Fiscal Year Local Sales Tax Revenues and Covenant Payment.

9.1 Within 30 days following the end of each Fiscal Year within the Term, Holliday Rock shall submit to City certified copies of Holliday Rock's quarterly reports to the CDTFA, including any and all reports filed in connection with Company Sales Activities at the Facility, which set forth the amount of sales tax paid by Holliday Rock to the CDTFA during the subject Fiscal Year in connection with Company Sales Activities at the Facility. Within 120 days following its receipt of the foregoing information from Holliday Rock, the City will determine the Local Sales Tax Revenues applicable to that Fiscal Year, the City Retained Portion, and the Covenant Payment for that Fiscal Year, and provide Holliday Rock with written notice of the City's determination ("Notice of Determination"), together with reasonable supporting documents and calculations. Notwithstanding any other provision of law, including, without implied limitation, any statutes of limitation provided in the Government Code or the Code of Civil Procedure, the City's determination of the matters set forth in the Notice of Determination shall be deemed final, conclusive, and non-appealable unless, within 30 days from its receipt of the Notice of Determination, Holliday Rock notifies the City in writing that Holliday Rock appeals one or more of the matters set forth in the Notice of Determination, which notice must specifically identify the matter appealed and all of the bases for such appeal ("Notice of Appeal"). Any matter set forth in the Notice of Determination that is not appealed in the manner and within the time limits set forth above, shall be final and conclusive as against Holliday Rock and all others claiming by or through Holliday Rock. The provisions of this Section 9 shall be strictly construed and Holliday Rock waives, to the maximum legal extent, any statutory or judicially created right to institute any administrative or judicial proceeding to contest any matter set forth in a Notice of Determination that is not timely appealed in strict accordance with this subsection 9.1.

9.2 If Holliday Rock does not file a Notice of Appeal, the City shall tender the Covenant Payment due for such Fiscal Year, if any, within 45 days from the earlier of: (i) receipt of the Notice of Determination by Holliday Rock, or (ii) Holliday Rock's written notice to the

City that it accepts the matters set forth in the Notice Of Determination. If Holliday Rock files a timely Notice of Appeal with the City, the City and Holliday Rock shall negotiate in good faith to resolve their dispute for a period of no less than 30 days (the "Negotiation Period"). If, by the end of the Negotiation Period, the City and Holliday Rock are unable to resolve the dispute set forth in the notice of appeal, each of them may exercise any judicial remedy available to them pursuant to this Agreement for the resolution of such dispute; provided, however, that any provision of law to the contrary notwithstanding, such judicial remedy must be instituted (defined as the filing of an action in a court of competent jurisdiction in strict accordance with the terms of this Agreement) within 90 days following the end of the Negotiation Period or be barred forever. In connection therewith, the City and Holliday Rock irrevocably consent to the appointment of a referee to resolve such dispute in accordance with Code of Civil Procedure Section 638, et seq., and to pay equal amounts of the cost of such referee.

9.3 The City and Holliday Rock agree that any disputed amount shall not accrue interest during the pendency of any Negotiation Period or subsequent legal proceeding (including any appeals filed in connection therewith), unless the court makes a determination upon recommendation of the referee that the City acted in bad faith with regard to the dispute, in which case any amount ultimately adjudged to be owing by the City shall be deemed to have accrued interest at the then-maximum legal rate imposed by the California Code of Civil Procedure on prejudgment monetary obligations, compounded monthly, until paid.

9.4 Any City payments due under this Agreement are payable from any source of any legally available funds of the City. City covenants to reasonably consider such actions as may be necessary to include all payments owed hereunder in each of its annual budgets during the Term and to reasonably consider the necessary annual budgetary appropriations for all such payments.

9.5 The City's obligations under Section 8 and this Section 9 are contingent on a year to year basis and, for each Fiscal Year within the Term, the City's obligations to make any payments to Holliday Rock under this Agreement are expressly contingent upon Holliday Rock, for the entirety of such Fiscal Year, completely fulfilling its material obligations under this Agreement. If for any reason Holliday Rock fails to authorize the release or use of sales tax information regarding the Facility in a manner satisfactory to the CDTFA or provide any information reasonably required by the City to perform the City's obligations under this Agreement, the City shall have no obligation to make any Covenant Payment to Holliday Rock for the period during which such information is unavailable to the City or the City is not legally authorized to use such information for the purposes of performing its obligations under this Agreement.

9.6 The City and Holliday Rock agree that, except as provided in subsection 9.7, the calculation and determination of all financial components of the Parties' rights and obligations under this Agreement shall be computed on a Fiscal Year to Fiscal Year basis. Revenues generated in one Fiscal Year may not be carried forward or back to any prior or future Fiscal Year, it being the express understanding of the Parties that for each Fiscal Year the financial obligations of the Parties and satisfaction of the conditions precedent to such obligations shall be

determined and made independently of any other Fiscal Year.

9.7 If, at any time during or after the Term of this Agreement, the CDTFA determines that all or any portion of the Local Sales Tax Revenues received by the City were improperly allocated and/or paid to the City, and if the CDTFA requires repayment of, offsets against future sales tax payments, or otherwise recaptures from the City those improperly allocated and/or paid Local Sales Tax Revenues, then Holliday Rock shall, within 30 days after written demand from the City, repay all Covenant Payments (or applicable portions thereof) theretofore paid to Holliday Rock which are attributable to such repaid, offset, or recaptured Local Sales Tax Revenues. If Holliday Rock fails to make such repayment within 30 days after the City's written demand, then Holliday Rock shall be in breach of this Agreement and such obligation shall accrue interest from the date of the City's original written demand at the then-maximum legal rate imposed by the California Code of Civil Procedure on prejudgment monetary obligations, compounded monthly, until paid. This subsection 9.7 shall survive the expiration or termination of this Agreement.

10. Operation Covenants.

10.1 Holliday Rock covenants to the City to use commercially reasonable efforts to continuously operate the Facility on the Property throughout the entirety of the Term, consistent with all applicable provisions of federal, state and local laws and regulations. Holliday Rock's obligations pursuant to the immediately preceding sentence include, without limitation, the obligation to obtain all federal, state and local licenses and permits required for the operation of the Facility and to advertise, market and promote the business in a commercially reasonable fashion, consistent with the objective of maximizing the amount of Local Sales Tax Revenues.

10.2 Except as otherwise provided by applicable law, including but not limited to Government Code Section 53084.5, Holliday Rock shall, in all reports to the CDTFA, designate the City as the "point of sale" for a significant portion of taxable sales related to Company Sales Activities occurring within the City. The State of California has provided general guidance and methods as to how revenue should be allocated to local jurisdictions for purposes of the Bradley-Burns Tax. (18 CA ADC § 1802(a)(2)). Generally, if a retailer has more than one place of business in California, the sale is usually deemed to have occurred where the principal negotiations are carried on. Holliday Rock reserves the right to source sales according to, and in compliance with, the Bradley Burns sourcing rules. Holliday Rock shall, for the full Term, at its sole cost and expense, maintain all permits, contractual arrangements, licenses, and registrations necessary for Holliday Rock to lawfully conduct Company Sales Activities and to designate the City as the "point of sale" in all reports and returns submitted to the CDTFA and shall consummate at the Facility all taxable sales transactions resulting from Holliday Rock's Company Sales Activities and identify the City as such in all reports to the CDTFA in accordance with Sales Tax Law it may be amended or substituted. Holliday Rock shall designate City as the sole point of sale for a significant portion of products sold, including but limited to, through an internet website or phone sales which are designated for any location within California. CDTFA shall maintain the appropriate master sales permits applicable to and

required for the operation of the Facility. Holliday Rock shall consummate all taxable sales transactions for Company Sales Activities at the Facility, consistent with all applicable statutory and CDTFA regulatory requirements applicable to Holliday Rock's Company Sales Activities and the designation of the City as the "point of sale" for a significant portion of Owner's Holliday Rock's Company Sales Activities at Facility.

10.3 Holliday Rock acknowledges and agrees that the sales and use tax reporting and payment information related to sales and use taxes attributable to Company Sales Activities may become a public record as a result of the covenants of Holliday Rock contained in this Section 10 and the payments to be made by the City to Holliday Rock. Holliday Rock hereby authorizes the City to use the sales and use tax reporting and payment information related to Company Sales Activities to allow the City to perform its obligations under this Agreement and to disclose such information when, in the City Attorney's reasonable opinion, such disclosure is required by law.

10.4 Holliday Rock covenants to the City that for the duration of the Term, Holliday Rock will not directly or indirectly solicit, accept, or enter into any agreement concerning any Prohibited Financial Assistance from any other public or private person or entity, to the extent such Prohibited Financial Assistance is given for the purpose of causing or would result in any event of default by Holliday Rock. For purposes of this subsection 10.4, the term "Prohibited Financial Assistance" means any direct or indirect payment, subsidy, rebate, or other similar or dissimilar monetary or nonmonetary benefit, including, without implied limitation, payment of land subsidies, relocation expenses, financial incentives, public financing, property or sales tax relief or rebates, relief from public improvement obligations, and payment for public improvements to or for the benefit of Holliday Rock.

10.5 Holliday Rock covenants and agrees that the Property upon which the Facility sits shall be put to no use other than those uses specified in the City's General Plan, any Specific Plans, zoning ordinances, and this Agreement, as the same may be amended from time to time. Nothing in this Section 10.5 shall limit, expand, modify or otherwise affect any right of the Holliday rock to continue any legal nonconforming use upon the Property following changes in the City's General Plan or zoning ordinances.

10.6 Nothing in this Section 10 is intended or shall operate as an agreement or covenant by Holliday Rock that Company Sales Activities will generate a minimum amount of Local Sales Tax Revenues or any amount of Local Sales Tax Revenues at all.

11. Covenant to Maintain Property on Tax Rolls During the Term.

11.1 Holliday Rock covenants to the City to cause the Property to remain on the County of San Bernardino, California, secured real property tax rolls throughout the Term.

11.2 Holliday Rock covenants to the City that neither Holliday Rock, nor its successors or assigns shall use or otherwise sell, transfer, convey, assign, lease, lease back, or hypothecate the Property or any portion thereof to any entity or party, or for any use of the Property, that is partially or wholly exempt from the payment of real property taxes or that would cause the

exemption of the payment of all or any portion of real property taxes otherwise assessable regarding the Property, without the prior written consent of the City, which will not be unreasonably withheld or conditioned.

12. Covenant to Maintain the Property.

12.1 Holliday Rock covenants to the City that areas of the Property that are subject to public view (including all existing improvements, paving, walkways, landscaping, exterior signage and ornamentation) shall be maintained in good repair and a neat, clean and orderly condition, ordinary wear and tear excepted, and free from the accumulation of trash or other debris and agrees to promptly remove, or cause the removal of, all graffiti upon the Facility. Owner shall also maintain or cause to be maintained the landscaping upon the Property in a good condition.

12.2 Graffiti, as this term is defined in Government Code Section 38772, that has been applied to any exterior surface of a structure or improvement on the Property that is visible from any public right-of-way adjacent or contiguous to the Property shall be removed within five business days by Holliday Rock by either painting over the evidence of such vandalism with a paint that has been color-matched to the surface on which the paint is applied or removing it with solvents, detergents or water, as appropriate.

13. Covenant Not to Discriminate. Holliday Rock covenants to the City that it will not discriminate against any employee or applicant for employment because of sex, marital status, race, color, religion, creed, national origin, or ancestry, and that it will comply with all applicable local, state, and federal fair employment laws and regulations. Holliday Rock further covenants and agrees that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, ancestry, or national origin in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the Property, nor shall Holliday Rock itself, or any person claiming under or through it, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use of occupancy of tenants, lessees, subtenants, sublessee, or vendees of the Property.

14. Covenant to Defend Agreement. Holliday Rock acknowledges that the City is a "public entity" and/or a "public agency" as defined under applicable California law. Therefore, the City must satisfy the requirements of certain California statutes relating to the actions of public entities, including, without limitation, CEQA. Also, as a public body, the City's action in approving this Agreement may be subject to proceedings to invalidate this Agreement or mandamus. Holliday Rock assumes the risk of delays and damages that may result to it from any third-party legal actions related to the City's approval of this Agreement or the pursuit of the activities contemplated by this Agreement, even in the event that an error, omission, or abuse of discretion by the City is determined to have occurred. If a third-party files a legal action regarding the City's approval of this Agreement or the pursuit of the activities contemplated by this Agreement, the City may terminate this Agreement on 30 days advance written notice to Holliday Rock of the City's intent to terminate this Agreement, referencing this Section 14,

without any further obligation to perform the terms of this Agreement and without any liability to Holliday Rock resulting from such termination, unless Holliday Rock unconditionally agrees to indemnify and defend the City, with legal counsel acceptable to the City, against such third-party legal action, within 15 calendar days following receipt of the City's notice of intent to terminate this Agreement, including without limitation paying all of the court costs, attorney fees, monetary awards, sanctions, attorney fee awards, expert witness and consulting fees, and the expenses of any and all financial or performance obligations resulting from the disposition of the legal action.

Following a third party legal action regarding the City's approval of this Agreement or the pursuit of the activities contemplated by this Agreement, Holliday Rock shall indemnify the City for any cost and expense, including attorneys' fees, arising from or in connection with City's response to said third party legal action incurred prior to either an agreement between the Parties to unconditional indemnify the City from such legal action, or termination of this Agreement, as set forth in this Section 14. Any agreement between the City and Holliday Rock with respect to third party legal actions must be in a separate writing and reasonably acceptable to the City in both form and substance and must be executed by both City and Holliday prior to the lapse of the 30 days' notice of intent to terminate referenced above. Nothing contained in this Section 14 shall be deemed or construed to be an express or implied admission that the City may be liable to Holliday Rock or any other person for damages or other relief alleged from any alleged or established failure of the City to comply with any statute, including, without limitation, CEQA.

15. Termination for Convenience. At any time following the fifth anniversary of the Effective Date, either Party may, upon one (1) year's prior written notice to the other Party given prior to and effective as of the first day of a Fiscal Year within the Term, terminate this Agreement and all of its executory obligations hereunder without cost, expense, or liability; provided, however, that both Parties shall continue to be liable for those obligations accruing prior to the effective date of termination and those obligations which are stated to survive the expiration or termination of this Agreement.

16. Payment of Prevailing Wages.

16.1 Holliday Rock acknowledges that the City has made no representation, express or implied, to Holliday Rock or any person associated with Holliday Rock regarding whether or not laborers employed relative to the construction and installation of capital improvements on the Property, if any, must be paid the prevailing per diem wage rate for their labor classification, as determined by the State of California, pursuant to Labor Code Sections 1720, et seq. Holliday Rock agrees with the City that Holliday Rock shall assume the responsibility and be solely responsible for determining whether or not laborers employed relative to any construction of capital improvements on the Property must be paid the prevailing per diem wage rate for their labor classification, as determined by the State of California, pursuant to Labor Code Sections 1720, et seq.

16.2 Holliday Rock, on behalf of itself, its successors, and assigns, waives and releases the City from any right of action that may be available to any of them pursuant to Labor Code

Sections 1726(c) and 1781. Holliday Rock acknowledges the protections of Civil Code Section 1542 relative to the waiver and release contained in this Section 16.2, which reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASING PARTY.

BY INITIALING BELOW, HOLLIDAY ROCK KNOWINGLY AND VOLUNTARILY WAIVES THE PROVISIONS OF SECTION 1542 SOLELY IN CONNECTION WITH THE WAIVERS AND RELEASES OF THIS SECTION 16:

Holliday Rock's Initials

Additionally, Holliday Rock shall indemnify, defend with counsel acceptable to the City, and hold harmless the City against any claims pursuant to Labor Code Sections 1726(c) and 1781 arising from this Agreement or the construction or installation of any capital improvements on the Property, in accordance with the terms of Section 17 of this Agreement.

17. Indemnification. The Parties hereby agree to indemnify and save and hold one another harmless from and against all "damages" (which term shall mean actual cash expenditures arising out of, resulting from, or relating to any damage, liability, loss, cost or deficiency, including, but not limited to, reasonably attorneys' fees and other costs and expenses incident to proceedings or investigations for the defense of any claim) incurred by any of the Parties arising out of, resulting from, or relating to any failure by any of the Parties to duly perform and observe any term, provision or covenant to be performed by any of the Parties pursuant to this Agreement.

18. No Effect on City's Legislative Authority. Nothing in this Agreement shall limit or restrict the authority of the City Council to take any other actions with respect to the Property and/or Holliday Rock without notice to or consent from Holliday Rock, except as may be expressly provided by applicable law.

19. Nonliability of the City or City Officials and Employees.

19.1 No council member, official, contractor, consultant, attorney, or employee of the City shall be personally liable to Holliday Rock, any voluntary or involuntary successors or assignees, or any lender or other party holding an interest in the Property, in the event of any Default or breach by the City, or for any amount which may become due to Holliday Rock or to its successors or assignees, or on any obligations arising under this Agreement.

19.2 No official, contractor, consultant, attorney or employee of Holliday Rock shall

be personally liable to City, any voluntary or involuntary successors or assignees, in the event of any Default by Holliday Rock, or for any amount which may become due to City or its successors or assignees, or on any obligations arising under this Agreement.

20. Conflict of Interests. No council member, official, contractor, consultant, attorney, or employee of the City, shall have any personal interest, direct or indirect, in this Agreement, nor shall any such council member, official, or employee participate in any decision relating to this Agreement which affects his/her personal interests or the interests of any corporation, partnership or association in which he/she is directly or indirectly interested.

21. Default.

21.1 Default Generally. Any failure to abide by any material provision of this Agreement or if any representation or warranty by a Party as set forth in this Agreement proves to have been false or misleading in any material respect when made, and said Party does not take the necessary action following notice pursuant to this Section 21 to remedy such breach within the time period set forth herein, shall constitute a default. Any failure or delays by any Party in asserting any of their rights and/or remedies as to any default shall not operate as a waiver of any default, nor deprive any Party of its right to institute and maintain any actions or proceedings that it may deem necessary to protect, assert or enforce any such rights or remedies.

21.2 Holliday Rock Default. City shall provide Holliday Rock with written notice of Holliday Rock's failure ("Holliday Rock Default") to strictly abide by any material provision of this Agreement, including, without limitation, the Covenants. Holliday Rock shall have thirty (30) days from the date of such notice to either cure such Holliday Rock Default, or, if such Holliday Rock Default cannot be reasonably cured during such thirty (30) day period, to commence to cure within said thirty (30) day period and diligently prosecute such cure to completion thereafter.

21.3 City Default. Holliday Rock shall provide City with written notice of City's failure ("City Default") to strictly abide by any material provision of this Agreement. City shall have thirty (30) days from the date of such notice to either cure such City Default, or, if such City Default cannot be reasonably cured during such thirty (30) day period, to commence to cure within said thirty (30) day period and diligently prosecute such cure to completion thereafter.

21.4 General Remedies for Default. Except as provided in Section 22, upon either a City Default or Holliday Rock Default (as defined in subsections 21.2 and 21.3), Holliday Rock or City (as applicable) shall have the right to seek all available legal and equitable remedies, including, without implied limitation, general and consequential damages, unless otherwise expressly provided to the contrary herein. Unless prohibited by law or otherwise provided by a specific term of this Agreement, the rights and remedies of the City and Holliday Rock under this Agreement are nonexclusive and all remedies hereunder may be exercised individually or cumulatively, and the City may simultaneously pursue inconsistent and/or alternative remedies. Either Party may, upon the Default of the other Party and in addition to pursuing all remedies otherwise available to it, terminate this Agreement and all of its obligations hereunder without

cost, expense or liability to itself.

21.5 The City's Rights to Terminate its Obligations under Section 8. The City's obligations under Section 8 shall automatically terminate without cost, expense, or liability to City, upon the occurrence of any one or more of the following: (i) Holliday Rock Default; (ii) the end of the Eligibility Period; or (iii) upon the final determination by a court of competent jurisdiction that any one or more of the Covenants are void, voidable, invalid, or even unenforceable for any reason whatsoever, including, without limitation, legal infirmity. Termination of the City's obligations under Section 8 in accordance with this Section 20.4 shall not operate to forgive, modify, discharge, or excuse Holliday Rock's obligations arising under this Agreement.

22. Liquidated Damages.

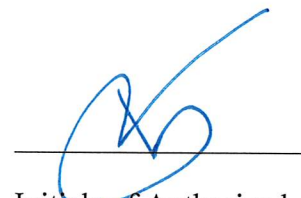
22.1 Holliday Rock Default With Respect to Obligations Under Sections 10 through 14. The Parties acknowledge that the consideration to the City for its entry into this Agreement and the performance of its obligations hereunder, include the City's receipt of Sales Tax Revenues arising from the operation of Company Sales Activities and the location of the Facility in the City in accordance with this Agreement. Holliday Rock agrees that the City will suffer damages if Holliday Rock commits any Holliday Rock Default with respect to any of its obligations arising under Sections 10 through 14. The Parties agree that the exact determination of such damages would be impracticable and extremely difficult to quantify. Accordingly, the Parties have determined that Liquidated Damages represent a reasonable estimate of the damages which would be suffered by the City if Holliday Rock commits any Holliday Rock Default with respect to any of its obligations set forth in Sections 10 through 14. Accordingly, in the event of a Holliday Rock Default with respect to any of its covenants and obligations set forth in Sections 10 through 14, the City shall be entitled to (i) terminate this Covenant Agreement and the entirety of its obligations hereunder, including any accrued and unpaid Covenant Payments, and (ii) receive from Holliday Rock the applicable amount of Liquidated Damages as provided herein.

22.2 ACKNOWLEDGEMENT OF REASONABLENESS OF LIQUIDATED DAMAGES. UPON A HOLLIDAY ROCK DEFAULT WITH RESPECT TO ANY OF ITS OBLIGATIONS SET FORTH IN SECTIONS 10 THROUGH 14, FOLLOWING NOTICE AND OPPORTUNITY TO CURE PURSUANT TO SECTION 21, THE CITY AND HOLLIDAY ROCK ACKNOWLEDGE AND AGREE THAT IT WOULD BE EXTREMELY DIFFICULT AND IMPRACTICAL TO ASCERTAIN THE AMOUNT OF DAMAGES THAT WOULD BE SUFFERED BY THE CITY WITH RESPECT TO SUCH DEFAULT. HAVING MADE DILIGENT BUT UNSUCCESSFUL ATTEMPTS TO ASCERTAIN THE ACTUAL DAMAGES THE CITY WOULD SUFFER, THE PARTIES AGREE THAT THE LIQUIDATED DAMAGES AMOUNT AS DETERMINED REPRESENTS A REASONABLE ESTIMATION OF THOSE DAMAGES. THEREFORE, UPON A HOLLIDAY ROCK DEFAULT WITH RESPECT TO ANY OF ITS OBLIGATIONS SET FORTH IN SECTIONS 10 THROUGH 14, AS REMEDY FOR SUCH DEFAULT, THE CITY SHALL BE ENTITLED

TO (i) RECEIPT OF THE LIQUIDATED DAMAGES AMOUNT CALCULATED IN ACCORDANCE WITH SUBSECTION 6.12, WHICH HOLLIDAY ROCK SHALL PAY WITHIN TEN (10) DAYS FOLLOWING WRITTEN DEMAND FROM THE CITY, AND (ii) TERMINATE THIS AGREEMENT AND THE ENTIRETY OF ITS OBLIGATIONS HEREUNDER, INCLUDING ANY ACCRUED BUT YET UNPAID COVENANT PAYMENTS.



Initials of Authorized
City Representative



Initials of Authorized
Holliday Rock Representative

23. Tax Consequences. Holliday Rock acknowledges that it may experience tax consequences as a result of its receipt of the payments provided for in this Agreement and agrees that it shall bear any and all responsibility, liability, costs, and expenses connected in any way therewith.

24. Rights Not Granted Under Covenant Agreement. This Agreement is not, and shall not be construed to be, a Development Agreement under Government Code Section 65864 et seq., or a disposition and development agreement under Health and Safety Code Section 33000 et seq. This Agreement is not, and shall not be construed to be, an approval or an agreement to issue permits or a granting of any right or entitlement by the City concerning the Facility, Company Sales Activities, or any other project, development, or construction by Holliday Rock in the City. This Agreement does not, and shall not be construed to, exempt Holliday Rock from the application and/or exercise of the City's power of eminent domain or its police power, including, but not limited to, the regulation of land uses and the taking of any actions necessary to protect the health, safety, and welfare of its citizenry.

25. Notices, Demands and Communications Between the Parties. Any and all notices, demands or communications submitted by a Party to the other Party pursuant to or as required by this Agreement shall be proper, if in writing and dispatched by messenger for immediate personal delivery, by a nationally recognized overnight courier service, or by registered or certified United States mail, postage prepaid, return receipt requested, to the principal office of the Party, as designated below. Such written notices, demands and communications may be sent in the same manner to such other addresses as the Party may from time to time designate. Any such notice, demand or communication shall be deemed to be received by the addressee, regardless of whether or when any return receipt is received by the sender or the date set forth on such return receipt, on the day that it is dispatched by messenger for immediate personal delivery, on the date of delivery by a nationally recognized overnight courier service or three (3) calendar days after it is placed in the United States mail, as provided pursuant to this Section. The following are the authorized addresses for the submission of notices, demands or communications to the Parties:

To Holliday Rock: Holliday Rock Co, Inc.
1401 N. Benson Avenue
Upland, CA 91786
Attn: John F. Holliday

With courtesy copy to: Schell Nuelle LLP
269 West Bonita Avenue
Claremont, CA 91711
Attn: Troy Schell

To the City: City of Upland
460 N. Euclid Ave.
Upland, CA 91786
Attn: City Manager

With courtesy copy to: Best Best & Krieger LLP
2855 E. Guasti Rd.
Suite 400
Ontario, CA 91761
Attn: Stephen Deitsch

26. Pledge or Hypothecation of Covenant Payments. Holliday Rock may assign any Covenant Payment(s) due in accordance with the terms of this Agreement (but not any other right or obligation of this Agreement) upon 30 days' prior written notice to City as collateral for any loan or financing obtained by Holliday Rock in connection with the Facility; provided that nothing in this Section 26 shall be deemed to limit the operation of Section 34. Without limiting the general applicability of the foregoing, Holliday Rock acknowledges that Holliday Rock's lender and any transferee of Holliday Rock's lender shall be subject to the transfer restrictions of Section 34.

27. Entire Agreement; Good Faith Negotiations. This Agreement contains all of the terms and conditions agreed upon by the Parties and supersedes any previous agreements between the Parties concerning the subject matter of this Agreement. No other understanding, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind any of the parties hereto. All prior written or oral offers, counteroffers, memoranda of understanding, proposals, and the like are superseded by this Agreement.

The Parties acknowledge that this Agreement is the product of mutual arms-length negotiations and that each party has been, or has had the opportunity to have been, represented by legal counsel in the negotiation and drafting of this Agreement. Accordingly, the rule of judicial construction which provides that ambiguities in a document are to be construed against the drafter of that document shall have no application to the interpretation or enforcement of this Agreement. In any action or proceeding to interpret and/or enforce this Agreement, the trier of

fact may refer to extrinsic evidence not in conflict with any specific provision of this Agreement to ascertain and give effect to the intent of the Parties hereto.

28. Time Deadlines Critical; Extensions and Delays; No Excuse Due to Economic Changes. Time is of the essence in the performance of the Parties' obligations under this Agreement. In addition to specific provisions of this Agreement providing for extensions of time, times for performance hereunder shall be extended where delays or defaults are due to war; insurrection; any form of labor dispute; lockouts; riots; floods; earthquakes; fires; acts of God or of third parties; third party litigation; acts of a public enemy; referenda; acts of governmental authorities (except that the failure of the City to act as required hereunder shall not excuse its performance); moratoria; epidemics; quarantine restrictions; and freight embargoes (collectively, "Enforced Delays") provided, however, that the Party claiming the extension notify the other Party of the nature of the matter causing the Enforced Delay within thirty (30) days from the occurrence thereof; and, provided further, that the extension of time shall be only for the period of the Enforced Delays. However, deadlines for performance may not be extended as provided above due to any inability of Holliday Rock to obtain or maintain acceptable financing for the operation of the Facility.

ANYTHING IN THIS AGREEMENT TO THE CONTRARY NOTWITHSTANDING, HOLLIDAY ROCK EXPRESSLY ASSUMES THE RISK OF UNFORESEEABLE CHANGES IN ECONOMIC CIRCUMSTANCES AND/OR MARKET DEMAND/CONDITIONS AND WAIVES, TO THE GREATEST LEGAL EXTENT, ANY DEFENSE, CLAIM, OR CAUSE OF ACTION BASED IN WHOLE OR IN PART ON ECONOMIC NECESSITY, IMPRACTICABILITY, FRUSTRATION OF PURPOSE, CHANGED ECONOMIC CIRCUMSTANCES, OR SIMILAR THEORIES.

HOLLIDAY ROCK EXPRESSLY AGREES THAT ADVERSE CHANGES IN ECONOMIC CONDITIONS, EITHER OF HOLLIDAY ROCK SPECIFICALLY OR THE ECONOMY GENERALLY, OR CHANGES IN THE MARKET CONDITIONS OR DEMANDS, SHALL NOT OPERATE TO EXCUSE OR DELAY THE STRICT OBSERVANCE OF EACH AND EVERY OF THE OBLIGATIONS, COVENANTS, CONDITIONS, AND REQUIREMENTS OF THIS AGREEMENT. HOLLIDAY ROCK EXPRESSLY ASSUMES THE RISK OF SUCH ADVERSE ECONOMIC OR MARKET CHANGES, WHETHER OR NOT FORESEEABLE AS OF HOLLIDAY ROCK'S EXECUTION OF THIS AGREEMENT.

HOLLIDAY ROCK'S INITIALS _____

29. Attorneys' Fees. In the event of the bringing of an arbitration, action or suit by a Party hereto against another Party hereunder by reason of any breach of any of the covenants or agreements or any intentional inaccuracies in any of the representations and warranties on the part of the other Party arising out of this Agreement or any other dispute between the Parties concerning this Agreement or the Property, then, in that event, the prevailing party in such action or dispute, whether by final judgment or arbitration award, shall be entitled to have and recover of and from the other Party all costs and expenses of suit or claim, including actual attorneys'

fees. Any judgment, order, or award entered in any final judgment or award shall contain a specific provision providing for the recovery of all costs and expenses of suit or claim, including actual attorneys' fees (collectively, the "Costs") incurred in enforcing, perfecting and executing such judgment or award. For the purposes of this Section 29, "Costs" shall include, without implied limitation, attorneys' and experts' fees, costs and expenses incurred in the following: (i) post judgment motions and appeals, (ii) contempt proceedings, (iii) garnishment, levy and debtor and third party examination, (iv) discovery; and (v) bankruptcy litigation. This Section 29 shall survive any termination of this Covenant Agreement.

30. Amendments to This Agreement. Any amendments to this Agreement must be in writing and signed by the appropriate authorities of both the City and Holliday Rock. The City Manager is authorized on behalf of the City to approve and execute minor amendments to this Agreement, including, but not limited to, the granting of extensions of time to Holliday Rock, not to exceed 90 days in the aggregate.

31. Jurisdiction and Venue. Any legal action or proceeding concerning this Agreement shall be filed and prosecuted in the appropriate California state court in the County of San Bernardino, California. Both Parties hereto irrevocably consents to the personal jurisdiction of that court. The City and Holliday Rock each hereby expressly waive the benefit of any provision of federal or state law or judicial decision providing for the filing, removal, or change of venue to any other court or jurisdiction, including, without implied limitation, federal district court, due to any diversity of citizenship between the City and Holliday Rock, due to the fact that the City is a party to such action or proceeding, or due to the fact that a federal question or federal right is involved or alleged to be involved. Without limiting the generality of the foregoing, the City and Holliday Rock specifically waive any rights provided to it pursuant to California Code of Civil Procedure Section 394. Holliday Rock acknowledges that the provisions of this Section 31 are material consideration to the City for its entry into this Agreement, in that the City will avoid the potential cost, expense, and inconvenience of litigating in a distant forum.

32. Counterpart Originals; Integration. This Agreement may be executed in duplicate originals, each of which is deemed to be an original, but when taken together shall constitute but one and the same instrument.

33. No Waiver. Failure to insist on any one occasion upon strict compliance with any of the terms, covenants, or conditions hereof shall not be deemed a waiver of such term, covenant, or condition, nor shall any waiver or relinquishment of any rights or powers hereunder at any one time or more times be deemed a waiver or relinquishment of such other right or power at any other time or times.

34. Successors and Assigns. The terms, covenants, and conditions of this Agreement shall be binding upon and inure to the benefit of the Parties hereto and their successors and assigns. Except as provided in this Section 34, Holliday Rock shall neither transfer nor convey Holliday Rock's interest in the Facility without providing thirty (30) days advanced notice to the City so City may determine whether it wishes to terminate this Agreement pursuant to the terms contained herein.

35. No Third Party Beneficiaries. The performance of the Parties' respective obligations under this Agreement are not intended to benefit any party other than the City or Holliday Rock, except as expressly provided otherwise herein. No person or entity not a signatory to this Agreement shall have any rights or causes of action against any party to this Agreement as a result of that party's performance or non-performance under this Agreement, except as expressly provided otherwise herein.

36. Warranty Against Payment of Consideration for Agreement. Holliday Rock warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement. Third parties, for the purposes of this Section 36, shall not include persons to whom fees are paid for professional services if rendered by attorneys, financial consultants, accountants, engineers, architects, and the like when such fees are considered necessary by Holliday Rock.

37. Severability. The City and Holliday Rock declare that the provisions of this Agreement are severable. If it is determined by a court of competent jurisdiction that any term, condition, or provision hereof is void, voidable, or unenforceable for any reason whatsoever, then such term, condition or provision shall be severed from this Agreement and the remainder of the Covenant Agreement enforced in accordance with its terms.

38. Further Acts and Releases. The City and Holliday Rock each agree to take such additional acts and execute such other documents as may be reasonable and necessary in the performance of their obligations hereunder.

39. Estoppels. At the request of Holliday Rock or any holder of a mortgage or deed of trust secured by all or any portion of the Property, the City shall promptly execute and deliver to Holliday Rock or such holder a written statement of the City as to any of the following matters as to which Holliday Rock or such holder may inquire: (i) that no default or breach exists, or would exist with the passage of time, or giving of notice, or both, by Holliday Rock pursuant to this Agreement, if such be the case; (ii) the total amount of Covenant Payments made by the City to Holliday Rock pursuant to this Agreement prior to the date of such written statement; (iii) the amount of any Covenant Payments earned by or due and owing to Holliday Rock pursuant to this Agreement as of the date of such written statement; (iv) the Covenant Payments for a particular Fiscal Year; (v) if the City has determined that Holliday Rock is in default or breach hereunder, the nature of such default and the action or actions required to be taken by Holliday Rock to cure such default or breach; and (vi) any other matter affecting the rights or obligations of Holliday Rock hereunder as to which Holliday Rock or such holder may reasonably inquire. The form of any estoppel letter shall be prepared by Holliday Rock or such holder at its sole cost and expense and shall be reasonably acceptable in form and content to the City and Holliday Rock. The City may make any of the representations described above based on the actual current knowledge of the then-current City Manager.

[Signatures on the following pages]

**SIGNATURE PAGE TO THE
HOLLIDAY ROCK
OPERATING COVENANT AGREEMENT**

CITY OF UPLAND
a California municipal corporation

By: _____

ATTEST:

By: _____

APPROVED AS TO FORM:

By: _____

Elizabeth Hull
Elizabeth Hull
Special Counsel

**SIGNATURE PAGE TO THE
HOLLIDAY ROCK
OPERATING COVENANT AGREEMENT**

Holliday Rock Co., Inc.

By: _____

Signature



Name (Print)

Secretary Treasurer

Title (Print)

Holliday Trucking, Inc.

By: _____

Signature



Name (Print)

Secretary Treasurer

Title (Print)

**EXHIBIT A
TO
OPERATING COVENANT AGREEMENT
(Holiday Rock)**

[Attached behind this cover page]

Name	Address	City	State	Zip
B/P # 1 FOOTHILL	2193 W FOOTHILL BLVD	UPLAND	CA	91786
B/P # 2 CAMPUS	2006 N CAMPUS AVE	UPLAND	CA	91786
B/P # 3 SAN BERNARDINO 1	2300 W BASELINE	SAN BERNARDINO	CA	92410
B/P # 4 COLTON	249 E SANTA ANA	RIALTO	CA	92316
B/P # 5 PALMDALE	7749 E AVENUE T	LITTLEROCK	CA	93543
B/P # 6 MTN VIEW	1499 N BENSON	UPLAND	CA	91786
B/P # 7 SANTA CLARITA	14320 SOLEDAD CYN RD	CANYON COUNTRY	CA	91387
B/P # 8 IRVINE	16191 CONST CIRCLE EAST	IRVINE	CA	92606
B/P # 9 ADELANTO	12750 RANCHO RD	ADELANTO	CA	92301
B/P #10 TEMECULA VLY	26100 ANTELOPE RD	ROMOLAND	CA	92585
B/P #11 TEHACHAPI	777 W TEHACHAPI BLVD	TEHACHAPI	CA	93561
B/P #12 MOJAVE	7037 TROTTER AVE	MOJAVE	CA	93501
B/P #14 IRWINDALE 1	257 E LONGDEN AVE	IRWINDALE	CA	91706
B/P #15 ANTELOPE VALLEY	7311 E AVENUE T	LITTLEROCK	CA	93543
B/P #16 BAKERSFIELD	2603 E BRUNDAGE LN	BAKERSFIELD	CA	93307
B/P #17 MONTEBELLO	1597 BLUFF RD	MONTEBELLO	CA	90640
B/P #18 CHINO	5150 SCHAEFER AVE	CHINO	CA	91710
B/P #19 SUN VALLEY 1	11420 PENROSE ST	SUN VALLEY	CA	91605
B/P #20 WESTMINSTER	7591 HAZARD ST	WESTMINSTER	CA	92683
B/P #21 PERRIS	1980 GOETZ RD	PERRIS	CA	92570
B/P #23 LONG BEACH	2521 E ARTESIA BLVD	LONG BEACH	CA	90805
B/P #24 VERNON	2822 SOUTH SOTO ST	VERNON	CA	90058
B/P #25 SANTA ANA	2130 S GRAND AVE	SANTA ANA	CA	92705
B/P #26 LANCASTER	42332 10TH STREET WEST	LANCASTER	CA	93534
B/P #27 VENTURA	5438 N VENTURA AVE	VENTURA	CA	93001
B/P #28 MISSION	840 S. CUCAMONGA AVE	ONTARIO	CA	91762
B/P #29 SAN BERNARDINO 2	2400 W. HIGHLAND AVE	SAN BERNARDINO	CA	92407
B/P #30 INDUSTRY	711 FAIRWAY DR	INDUSTRY	CA	91789
B/P #31 CANOGA PARK	7001 DEERING AVE	CANOGA PARK	CA	91304
B/P #32 SUN VALLEY 2	8981 BRADLEY AVE	SUN VALLEY	CA	91352
B/P #33 IRWINDALE 3	590 EAST LIVE OAK AVE	IRWINDALE	CA	91706